

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Ohio Democratic Party et al.,	:	
	:	
Plaintiffs-Appellees,	:	No. 20AP-421
	:	(C.P.C. No. 20CV-4997)
v.	:	
	:	(ACCELERATED CALENDAR)
Frank LaRose, in his official capacity as Ohio Secretary of State,	:	
	:	
Defendant-Appellant.	:	
	:	
Ohio Democratic Party et al.,	:	
	:	
Plaintiffs-Appellees,	:	
	:	
v.	:	
	:	
Frank LaRose, in his official capacity as Ohio Secretary of State,	:	No. 20AP-428
	:	(C.P.C. No. 20CV-4997)
	:	
Defendant-Appellee,	:	(ACCELERATED CALENDAR)
	:	
[Donald J. Trump for President, Inc., The Ohio Republican Party, The Republican National Committee, and The National Republican Congressional Committee,	:	
	:	
Intervenors-Appellants].	:	
	:	

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D E C I S I O N

Rendered on September 29, 2020

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**On brief:** *MCTIGUE & COLOMBO LLC, Donald J. McTigue, J. Corey Colombo, and Derek Clinger; O'Connor, Haseley, & Wilhelm, and N. Zachary West*, for plaintiffs-appellees. **Argued:** *Donald J. McTigue*.

**On brief:** *Dave Yost, Attorney General, Heather L. Buchanan, and Renata Y. Staff*, for defendant-appellant Frank LaRose, in his official capacity as Ohio Secretary of State. **Argued:** *Renata Y. Staff*.

**On brief:** *JONES DAY, Edward M. Carter, M. Ryan Harmanis, John M. Gore and E. Stewart Crosland*, for intervenors-appellants. **Argued:** *M. Ryan Harmanis*.

**On brief:** *Miller Canfield Paddock and Stone, P.L.C., Scott R. Lesser, and Nancy A. Valentine; The Brennan Center for Justice, Lawrence Norden, Daniel I. Weiner, and Derek Tisler*, for amici curiae Election Cybersecurity Experts and Voting Rights Organizations.

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APPEALS from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Appellants, Frank LaRose in his official capacity as Ohio Secretary of State ("Secretary LaRose" or "the secretary") and Donald J. Trump for President, Inc., the Ohio Republican Party, and the National Republican Congressional Committee (hereinafter collectively referred to as "the Republican committees"), appeal from a September 11, 2020 judgment of the Franklin County Court of Common Pleas granting a motion for preliminary injunction filed by appellees, Ohio Democratic Party ("ODP") and Jay Michael Houlahan to enjoin the secretary from enforcing his directive that boards of election accept delivery of applications for absentee ballots only as submitted in person or by mail and therefore not by electronic means such as email or fax. Because of the unrebutted, compelling evidence of harm to third parties and the great public interest in preserving the security of Ohio's 2020 general election, and because appellees have demonstrated only that R.C. 3509.03 does not itself prohibit any particular method of application delivery but have failed to show a substantial likelihood of success on claims regarding the secretary's duties

to instruct the boards as to what methods of delivery now to accommodate, we reverse the trial court's decision granting the requested preliminary injunction.

## **I. BACKGROUND**

### **A. Absentee voting by mail in Ohio**

{¶ 2} The Ohio Elections Code authorizes a "no-fault" system of absentee voting in which any "qualified elector"<sup>1</sup> may choose to vote by absentee ballot in an election. (Grandjean Aff. at ¶ 5; R.C. 3509.02.) A qualified elector who would like to cast their vote by absentee ballot in an election "shall make written application for those ballots to the director of elections of the county in which the elector's voting residence is located." R.C. 3509.03(A). "[T]he application need not be in any particular form but shall contain" certain identification information, required statements, and the elector's signature. R.C. 3509.03(B). The secretary has prescribed a standard application that voters may use to request an absentee ballot, Form No. 11-A, but an applicant is not required to use this form to request a ballot. Once completed, an application for an absentee ballot "shall be delivered to the director [of the county board of elections]." R.C. 3509.03(D). The code does not specify the methods for delivery.

{¶ 3} The Ohio secretary of state is authorized to issue directives to county boards of elections. R.C. 3501.05(B) and (C); R.C. 3501.053. Directive 2019-28, a directive in place since December 18, 2019 and a part of the Ohio Elections Manual, provides a procedure for qualified electors to submit their applications for absentee ballots in person and by mail. (Grandjean Aff. at ¶ 31; Directive 2019-28 at 4-5.) That procedure mirrors the rule directed by secretaries of state since 2007. A separate code section addresses methods by which uniformed services or overseas absent voters (also called "UOCAVA" voters after the operative federal act, "Uniformed and Overseas Citizens Absentee Voting Act") may submit their application for an absentee ballot. They "may personally deliver the application to the director or may mail it, send it by facsimile machine, send it by electronic mail, send it through internet delivery if such delivery is offered by the board of elections or the secretary of state, or otherwise send it to the director." R.C. 3511.02(A)(1).

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<sup>1</sup> A "qualified elector" is "a person having the qualifications provided by law to be entitled to vote." R.C. 3501.01(N).

{¶ 4} A qualified elector who wants to vote by absentee ballot in a November election is able to deliver his or her application to the director of the county board of elections beginning January 1st of the election year and cannot deliver it later than 12:00 p.m. on the Saturday before the election. R.C. 3509.03(D). Once the director of the county board of elections verifies the applicant is a qualified elector, the director delivers the absentee ballot and return envelope "to the applicant in person or mail directly to the applicant by special delivery mail, air mail, or regular mail, postage prepaid." R.C. 3509.04(B). Boards may begin mailing absentee ballots to those who have requested them on the first day after the close of voter registration before election day (30 days prior to the election) and may continue mailing absentee ballots as they receive valid applications up until 12:00 p.m. the Saturday before election day. Directive 2019-28 at 5; R.C. 3509.01(B); R.C. 3503.12. For UOCAVA voters, absentee ballots must be printed and ready for use on the 46th day before the day of the election. Directive 2019-28 at 5-19; R.C. 3511.021. The qualified elector must mail the absentee ballot to the director, personally deliver it to the director, or have certain family members deliver it to the director, with an exception provided for disabled and confined absentee voters. R.C. 3509.05; R.C. 3509.08.

**B. The 2020 Ohio primary election and lead up to the November general election**

{¶ 5} Ohio's primary election was scheduled for March 17, 2020. On March 9, 2020, Governor Mike DeWine declared a state of emergency in response to the spread of COVID-19 and, the day before the election, announced that it was unsafe to hold in-person voting for the primary election. Legal challenges surrounding the primary election and the various government responses followed, including: a lawsuit seeking an emergency delay of the election (denied); an order from the Ohio's Department of Health Director prohibiting polling locations from operating; Secretary LaRose issuing a Directive 2020-06 to suspend in-person voting in the primary election until June 2, 2020; lawsuits challenging the secretary's Directive; the General Assembly passing H.B. No. 197 (to, among many other COVID-19 related relief provisions, set April 28, 2020 as the deadline by which absentee ballots must be received); and a lawsuit challenging that law (temporary restraining order

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denied).<sup>2</sup> On March 22, 2020, Ohioans were ordered, with some exceptions, to stay home and to maintain social distancing staying at least six feet apart from each other.

{¶ 6} The stay-at-home order was lifted in May 2020. Since then restrictions gradually have been removed and replaced by guidance and requirements for reopening; a state-wide mask order added by the governor in July remains in place.<sup>3</sup>

{¶ 7} In anticipation of the 2020 general election, on July 17, 2020, Secretary LaRose issued a temporary directive, Directive 2020-13, to all county boards of elections to address "Preparation for the Statewide Mailings of Absentee Ballot Applications for the November 3, 2020 General Election." (Directive 2020-13, Am. Compl., Ex. A at 1.) The directive announced that the secretary of state's office will mail an absentee ballot application to every registered Ohio voter in "active" or "confirmation" status. (Directive 2020-13 at 1.) Citing R.C. 3509.03, Directive 2020-13 also stated, "[t]he voter must complete the absentee ballot application by providing the voter's date of birth, identification, and signature before sealing the application in the reply envelope and *submitting it to the voter's county board of elections in person or by mail*, with the voter affixing a first-class stamp." (Emphasis added.) (Directive 2020-13 at 1.) The mailings of absentee ballot applications to all registered voters went into the last phase of the printing process on July 31, 2020 and began to go out the last week in August; they contain return envelopes for the applications. (Grandjean Aff. at ¶ 12, 16.)

### **C. Instant litigation**

{¶ 8} On July 31, 2020,<sup>4</sup> appellees filed a complaint for a declaratory judgment and injunctive relief pertaining to the methods of submitting a completed written application for an absentee ballot under the language of R.C. 3509.03. Specifically, appellees asserted in their complaint that they are entitled to the following declarations:

#### **COUNT ONE**

R.C. 3509.03 does not prohibit qualified electors from making application for an absentee ballot by emailing an image of their application to their county

<sup>2</sup> See *League of Women Voters v. LaRose*, S.D. Ohio No. 2:20-cv-1638 (Apr. 3, 2020) for a more detailed description of the Ohio primary and legal challenge to H.B. No. 197.

<sup>3</sup> See <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/responsible-restart-ohio> for Ohio's reopening plan (accessed September 28, 2020).

<sup>4</sup> Appellees filed an amended complaint on August 4, 2020.

board of elections or by other viable electronic form of transmission, such as facsimile machine[.]

COUNT TWO

Qualified electors have a right under R.C. 3509.03 to make application for an absentee ballot by emailing an image of their application to their county board of elections or by other viable electronic form of transmission, such as facsimile machine, and to have their application processed in the same manner as a hard-copy application[.]

[COUNT THREE]

[R]efusal to accept qualified electors' applications for absentee ballots that are timely emailed or transmitted by other viable electronic form of transmission, such as facsimile machine, to the appropriate county board of elections and contain all the required information set forth in RC. 3509.03 constitutes a denial of the electors' rights to equal protection of the laws guaranteed by Article I, Section 2 of the Ohio Constitution.

[COUNT FOUR]

[R]efusal to accept qualified electors' applications for absentee ballots that are timely emailed or transmitted by other viable electronic form of transmission, such as by facsimile machine, to the appropriate county board of elections and contain all the required information set forth in RC. 3509.03 constitutes a denial of the electors' due process rights guaranteed by Article I, Section 16 of the Ohio Constitution.

(Am. Compl. at 15-18.) Appellees attached Directives 2019-28 and 2020-13 to their amended complaint.

{¶ 9} On the same day they filed the complaint, appellees filed a motion for a preliminary injunction and expedited schedule. In it, appellees "move[d] the Court \* \* \* for a preliminary injunction enjoining the enforcement of [Secretary LaRose's] interpretation of R.C. 3509.03 as prohibiting voters from making their application for an absentee ballot by emailing an image of their request to the director of the county board of election, or by other viable electronic forms of transmission, in contravention of the plain terms of R.C. 3509.03." (Mot. for Prelim. Inj. at 1.) Appellees also "request[ed]" that the trial court order the secretary to include in his statewide mailings to registered voters an instruction that they can submit their completed applications by electronic means and to order the secretary to direct the county boards of elections to accept and process valid absentee ballot applications sent by these methods. *Id.*

{¶ 10} The secretary filed a combined memorandum in opposition to appellees' motion for preliminary injunction and a motion to dismiss. The secretary attached the affidavit of Amanda Grandjean, Deputy Assistant Secretary of State and State Elections Director; Directives 2007-06, 2008-82, 2010-93, 2012-24, 2014-15, and 2016-18, all stating absentee voters must submit a complete application for absentee ballot either in person or my mail; the affidavit of Spencer Wood, Chief Information Officer for the Ohio Secretary of State; Directives 2018-15 and 2018-18, addressing cybersecurity risks, requirements, and instructions; the affidavits of Sherry Poland and Karla Herron, directors of separate county boards of elections; a publication addressing election planning for emergencies; and a copy of H.B. No. 224. Appellees filed a reply and attached the affidavits of Gregory Beswick, Executive Director of ODP, and Houlahan, and copies of three newspaper articles.

{¶ 11} On August 17, 2020, the Republican committees moved to intervene as party defendants. The trial court granted the motion to intervene on September 8, 2020. The trial court denied a motion for leave to file a brief of amicus curiae filed by a group of "cybersecurity and voting rights experts" comprised of eight individuals and two organizations.

{¶ 12} On September 11, 2020, the trial court granted the motion for preliminary injunction. In doing so, the trial court found that: R.C. 3509.03 does not prohibit qualified electors from submitting their absentee ballot applications by email or fax and appellees demonstrated a likelihood of success on the merits; the harm asserted by appellees is not speculative and Directive 2020-13 "places an additional burden on eligible voters' access to voting" that is not outweighed by the justifications presented; the secretary's arguments did not satisfy "harm" to third parties; and the public interest favors the injunction because "any burden placed on the boards, if any, is clearly outweighed by the public interest of additional and easier access to obtaining an absentee ballot." (Decision & Entry at 12-13.)

{¶ 13} On the same day the decision was issued by the trial court, the Republican committees filed an answer, and, on September 14, 2020, filed a combined memorandum in opposition to appellees' motion for preliminary injunction and a motion to dismiss.

{¶ 14} The secretary and Republican committees filed separate appeals, which have been consolidated for purposes of oral argument and determination. This court granted

appellants' motion to stay the preliminary injunction pending appeal. The same cybersecurity and voting rights group that approached the trial court filed a brief of amici curiae in support of appellees' request to affirm the trial court's preliminary injunction decision.

## II. ASSIGNMENT(S) OF ERROR

{¶ 15} Secretary of State LaRose assigns the following as trial court error:

The trial court erred by granting a preliminary injunction requiring Ohio's 88 county boards of elections to accept non-UOCAVA absentee ballots via email or fax.

{¶ 16} The Republican committees<sup>5</sup> assign the following as trial court error:

[I.] The trial court erred in holding that Plaintiffs have standing in the absence of a concrete, particularized injury different from that of citizens generally.

[II.] The court erred in holding that laches does not apply despite Plaintiffs' 13-year delay in bringing this case with no valid excuse.

[III.] The court erred in rejecting the Secretary's reasonable and longstanding interpretation of R.C. 3509.03 in Directive 2020-13 and holding that statutory silence requires Ohio's boards of elections to accept electronic absentee ballot applications.

[IV.] The court erred in holding that the remaining equitable factors weighed in favor of an injunction.

## III. LEGAL ANALYSIS

{¶ 17} Collectively, appellants challenge the trial court's decision in three aspects: (1) appellees' standing to bring the declaratory judgment action; (2) the applicability of laches; (3) and the merits of whether the preliminary injunction is warranted. For the

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<sup>5</sup> We note appellees contend that because the Republican committees failed to make any arguments to the trial court with respect to the preliminary injunction, they cannot now challenge the judgment granting the preliminary injunction on appeal. Generally, a party who fails to raise an issue in the court below waives his or her right to raise that issue on appeal. *Evans v. Evans*, 10th Dist. No. 08AP-398, 2008-Ohio-5695, ¶ 6. However, in this case, the issues were raised, just by another party. In other words, this is not a case where the trial court was not able to consider these issues in the first instance. We further note that the trial court judgment on preliminary injunction was issued on the same day the Republican committees filed their answer and only three days after granting the motion to intervene. Considering all of the above, we decline to bar the Republican committees' assigned errors in this case.



following reasons, we find that appellants failed to demonstrate appellees lacked standing or that laches bars appellees' claims but succeeded in demonstrating the trial court's decision on the preliminary injunction was a clear abuse of discretion in this case.

### **A. Standing**

{¶ 18} Before a court may consider the merits of a legal claim, the plaintiff must establish standing to sue. *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, ¶ 18. To demonstrate traditional standing, the plaintiff must show that it has "suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, ¶ 22. Standing requires a litigant to "have a 'direct, personal stake' in the outcome of the case; 'ideological opposition to a program or legislative enactment is not enough.'" *Walgate* at ¶ 18, quoting *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶ 7.

{¶ 19} Here, with regard to plaintiff Houlahan, both the secretary and the Republican committees assert that Houlahan lacks standing because he has not shown that he has suffered any injury. To establish the first element of traditional standing, a plaintiff must demonstrate that the challenged action will cause it injury in fact, whether that injury is economic or otherwise. *League of United Latin Am. Citizens v. Kasich*, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 34. The injury must be concrete, not simply abstract or suspected. *State ex rel. Food & Water Watch v. State*, 153 Ohio St.3d 1, 2018-Ohio-555, ¶ 20. Additionally, the injury must be particularized, meaning the injury is not borne by the population in general, but affects the plaintiff in a personal and individual way. *Spokeo, Inc. v. Robins*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 1540, 1548 (2016); *League of United Latin Am. Citizens* at ¶ 21. Importantly, the injury need not be large, but only "palpable." *League of United Latin Am. Citizens* at ¶ 21. *Accord New York Republican State Comm. v. Secs. & Exchange Comm.*, 927 F.3d 499, 504 (D.C.Cir.2019) ("[E]ven slight injury is sufficient to confer standing[.]"); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir.2007) (holding that standing "requires only a minimal showing of injury").

{¶ 20} With regard to Houlahan's alleged injury, the amended complaint states:

Plaintiff Houlahan, who is 81 years old and is a qualified Ohio elector, intends to vote by absentee ballot in the November 3, 2020 general election, and he desires to submit his completed

application for an absentee ballot to his county board of elections via email. But Plaintiff Houlahan is subject to Defendant Secretary's interpretation of R.C. 3509.03 as precluding voters from requesting absentee ballots in this manner, and as a result, his right to request an absentee ballot via email or through other viable forms of electronic transmission, such as facsimile, will be impeded. This, in turn, will require Plaintiff Houlahan to choose between submitting his absentee ballot request in-person, which would require him to spend the time and resources necessary to travel to his county board of elections and requiring him [to] risk his health and election officials' health in light of the ongoing COVID-19 pandemic, or submitting the request by mail, which would require him to spend the resources necessary to mail his request and to risk disenfranchisement due to delays in mail delivery.

(Am. Compl. at ¶ 48.)

{¶ 21} Given these allegations, Houlahan has established that submitting an absentee ballot in-person or through the mail will require him to expend his time and resources. While Houlahan will most likely not spend much time or money in delivering his absentee ballot to his board of elections or a mail receptacle, he will incur a real—not an abstract or suspected—loss of resources. Moreover, that loss is specific to *his* time and money, not the public generally. Houlahan, therefore, has established an injury that is both concrete and particularized.

{¶ 22} The Republican committees argue that Houlahan's injury is not particularized because it is the same sort of injury that any Ohioan applying to vote absentee will suffer. We are not persuaded by this argument.

{¶ 23} A plaintiff who complains only of an injury sustained by the general public raises a generalized grievance against the law instead of establishing a particularized injury. *Walgate*, 2016-Ohio-1176 at ¶ 19. Thus, for example, in *Walgate*, the plaintiffs lacked standing to challenge the constitutionality of gambling legislation because they failed to allege any injury beyond the negative effects of gambling that applied equally to all members of the general public. *Id.* at ¶ 22, 26. This case is not like *Walgate*. Here, Houlahan asserts an injury applicable to a subset of the general population, i.e., those Ohioans who decide to vote via absentee ballot. While many Ohioans will suffer or have suffered the same sort of injury as Houlahan, "[t]he fact that an injury may be suffered by

a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo, Inc.* at 1548, fn. 7. Where harm is concrete, although widely shared, courts have found injury in fact, particularly when "large number of voters suffer interference with voting rights conferred by law" as Houlahan claims here. *Fed. Election Comm. v. Akins*, 524 U.S. 11, 24 (1998). Houlahan's injury is concrete. Consequently, even though multiple people will or have experienced the same type of injury, Houlahan's injury remains particular to him.

{¶ 24} Next, we turn to the Republican committees' argument that plaintiff ODP lacks standing. As an association, ODP has standing to sue on behalf of its members when (1) its members would otherwise have standing to sue in their own right, (2) the interests ODP seeks to protect are germane to ODP's purpose, and (3) neither the claims asserted nor the relief requested require the participation of individual members in the lawsuit. *Food & Water Watch*, 2018-Ohio-555 at ¶ 18. Significantly, the Republican committees challenge only the first element, contending that ODP did not establish that its members would have standing to sue on their own right. For the reasons we set forth with regard to plaintiff Houlahan, we conclude that the Republican committees are incorrect. ODP members could, in fact, sue on their own behalf.

{¶ 25} In sum, we determine that both Houlahan and ODP have standing. Accordingly, we overrule the Republican committees' first assignment of error.

### **B. Laches**

{¶ 26} In their second assignment of error, the Republican committees contend the trial court abused its discretion in failing to bar appellees' claims based upon the equitable doctrine of laches. We disagree, at least in the current posture of this case.

{¶ 27} The Republican committees essentially assert that, due to laches, relief cannot be granted on appellees' stated claims, requiring dismissal. They inherently raise the issue of whether the trial court erred in denying<sup>6</sup> appellants' motion to dismiss based on laches. "A motion to dismiss for failure to state a claim upon which relief can be granted

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<sup>6</sup> "When a trial court fails to rule upon a pretrial motion, an appellate court presumes that the trial court overruled it." *Evans v. Evans*, 10th Dist. No. 08AP-398, 2008-Ohio-5695, ¶ 13. Moreover, we find that the trial court did, in fact, consider the issues underlying the motion to dismiss; when the trial court granted the preliminary injunction after having issues arguably warranting dismissal raised by the parties "it implicitly found that [the defendant's] motion lacked merit." *Id.*

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\* \* \* tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). "In ruling on a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must construe the complaint in the light most favorable to the plaintiff, presume all factual allegations in the complaint are true, and make all reasonable inferences in favor of the plaintiff." *White v. Ohio Pub. Defender*, 10th Dist. No. 19AP-243, 2019-Ohio-5204, ¶ 10, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). "The dismissal of a complaint for failure to state a claim is proper when it appears, beyond doubt, that the plaintiff can prove no set of facts entitling him to relief." *Id.*, citing *Celeste v. Wiseco Piston*, 151 Ohio App.3d 554, 2003-Ohio-703, ¶ 12 (11th Dist.). We review a trial court's decision on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted de novo. *Id.*

{¶ 28} The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) actual or constructive knowledge of the injury or wrong, and (4) prejudice to the other party. *State ex rel. Citizens for Responsible Green Govt. v. Green*, 155 Ohio St.3d 28, 2018-Ohio-3489, ¶ 16, citing *State ex rel. Carrier v. Hilliard City Council*, 144 Ohio St.3d 592, 2016-Ohio-155, ¶ 8. " 'Extreme diligence and promptness are required in election-related matters.' " *State ex rel. Ascani v. Stark Cty. Bd. of Elections*, 83 Ohio St.3d 490, 493 (1998), quoting *In re Contested Election of November 2, 1993*, 72 Ohio St.3d 411, 413 (1995). When a party seeking relief in an election-related matter fails to exercise the requisite diligence and promptness, laches may bar the action. *State ex rel. Demaline v. Cuyahoga Cty. Bd. of Elections*, 90 Ohio St.3d 523, 526 (2000), citing *State ex rel. Bona v. Orange*, 85 Ohio St.3d 18, 20-21 (1999).

{¶ 29} As the present case involves an election-related matter, appellees bear the burden of establishing that they acted with the requisite diligence. *Id.*, citing *State ex rel. Manos v. Delaware Cty. Bd of Elections*, 83 Ohio St.3d 562, 564 (1998); *State ex rel. Carberry v. Ashtabula*, 93 Ohio St.3d 522, 523-24 (2001); *State ex rel. Vickers v. Summit Cty. Council*, 97 Ohio St.3d 204, 2002-Ohio-5583, ¶ 13. In addition, the Supreme Court of Ohio has stated that "[o]ur consistent requirement that expedited election cases be filed with the required promptness is not simply a technical nicety." *Carberry* at 524.

{¶ 30} Here, in their amended complaint, appellees "affirmatively allege that they have acted with the utmost diligence in bringing the instant action, that there has been no

unreasonable delay or lapse of time in asserting their rights sought herein, and, further, there is no prejudice to Defendants." (Am. Compl. at ¶ 54.) Under the standard for Civ.R. 12(B)(6) and in the broader context of the other allegations in the complaint, we find this assertion sufficient to avoid dismissal. We note the principles underlying the doctrine of laches with respect to election cases are relevant to assessing the equitable factors of preliminary judgment, explored below. Accordingly, we overrule the Republican committees' second assignment of error.

### C. Merits of preliminary injunction

{¶ 31} A fine line separates an action for declaratory judgment and injunctive relief from an action in mandamus. *See State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, ¶ 16-24 (discussing the distinction between actions that seek to compel official action that state a claim in mandamus and those that seek to prevent official action cognizable as claims for declaratory action and injunctive relief). In this case, no appellant argues that appellees' action for a declaratory judgment and injunctive relief asking to enjoin the secretary's enforcement of his directive is actually a request for mandamus to cause the secretary to adjust his directive. In the interest of expedition necessitated by the timing of the filings and considering all parties have assumed that this case is properly assessed within the context of the law of injunctions, we adopt that analysis. *Compare, e.g., Gilligan v. Hoddinott*, 36 Ohio St.2d 127, 131 (1973), quoting *State ex rel. Armstrong v. Davey*, 130 Ohio St. 160, 163 (1935) (" 'No executive act dependent on the judgment or discretion of the Governor is subject to judicial control, and mandamus will not lie unless there has been a clear abuse of discretion.' ").

{¶ 32} A party requesting a preliminary injunction must show that: (1) there is a substantial likelihood that the plaintiff will prevail on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction. *Vineyard Christian Fellowship of Columbus v. Anderson*, 10th Dist. No. 15AP-151, 2015-Ohio-5083, ¶ 11; *Escape Ents., Ltd. v. Gosh Ents., Inc.*, 10th Dist. No. 04AP-834, 04AP-857, 2005-Ohio-2637, ¶ 22. A party seeking a preliminary injunction has the burden of establishing a right to the preliminary injunction by demonstrating clear and convincing evidence of each of these factors. *Hydrofarm, Inc. v. Orendorff*, 180 Ohio App.3d 339,

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2008-Ohio-6819, ¶ 18 (10th Dist.). In determining whether to grant injunctive relief, not one of the four factors is dispositive; rather, a balancing should be applied. *Escape Ents., Ltd.* at ¶ 48. "A court should exercise great caution regarding the granting of an injunction which would interfere with another branch of government, and we have recognized that a court cannot employ equitable principles to circumvent valid legislative enactments[.]" *Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, ¶ 16.

{¶ 33} Whether the trial court erred in granting or denying an injunction is reviewed on appeal for a clear abuse of discretion. *Escape Ents., Ltd.* at ¶ 22. An abuse of discretion occurs when a trial court's decision is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Questions of law are reviewed de novo. *Intralot, Inc. v. Blair*, 10th Dist. No. 17AP-444, 2018-Ohio-3873, ¶ 30.

**1. Substantial likelihood that the plaintiff will prevail on the merits**

{¶ 34} Appellants challenge the trial court's determination that appellees demonstrated a substantial likelihood that they will prevail on the merits of their claims for declaratory judgment relating to R.C. 3509.03 and the denial of qualified electors' constitutional rights to due process and equal protection of the law. For the following reasons, we find that appellees established a substantial likelihood that they will prevail on the merits of count one of their amended complaint but have failed to establish a substantial likelihood that they will prevail on the merits of counts two, three, and four of their amended complaint.

**a. Claims based on R.C. 3509.03**

{¶ 35} Appellees seek a declaratory judgment acknowledging R.C. 3509.03 "does not prohibit" qualified electors from making applications for absentee ballots by email or other viable electronic means, such as fax, and, further, that they have a statutory "right" to do so. (Am. Compl. at 15.) Appellants counter that because R.C. 3509.03 is silent on the issue of whether the electronic return of applications for absentee ballots to county boards of elections is "allow[ed]" and/or "authoriz[ed]," as a matter of law, a court must defer to the secretary's reasonable interpretation of R.C. 3509.03. (Appellant's Brief at ix, 8.)

{¶ 36} "A dispute over the meaning of a statute presents a question of law that we consider de novo." *Piazza v. Cuyahoga Cty.*, 157 Ohio St.3d 497, 2019-Ohio-2499, ¶ 16, citing *Progressive Plastics, Inc. v. Testa*, 133 Ohio St.3d 490, 2012-Ohio-4759, ¶ 15. "Our

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primary goal in statutory interpretation is to give effect to the legislature's intent." *Id.*, citing *Christe v. GMS Mgt. Co., Inc.*, 88 Ohio St.3d 376, 377 (2000).

{¶ 37} "The court must first look to the plain language of the statute itself to determine the legislative intent.'" *State ex rel. Peregrine Health Servs. of Columbus, LLC v. Sears*, 10th Dist. No. 18AP-16, 2020-Ohio-3426, ¶ 29, quoting *State v. Bundy*, 4th Dist. No. 11CA818, 2012-Ohio-3934, ¶ 46. "[W]ords in a statute do not exist in a vacuum." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 19. "This means that 'our attention should be directed beyond single phrases, and we should consider, in proper context, all words used by the General Assembly in drafting [the relevant statute] with a view to its place in the overall statutory scheme.'" *State v. Gonzales*, 150 Ohio St.3d 276, 2017-Ohio-777, ¶ 5, quoting *D.A.B.E., Inc.* at ¶ 19. See *State ex rel. Peregrine Health Servs.* at ¶ 29 ("We must consider the statutory language in context, construing words and phrases according to the rules of grammar and common usage."). Furthermore, "[w]e may not restrict, constrict, qualify, narrow, enlarge, or abridge the General Assembly's wording." *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, ¶ 18.

{¶ 38} "When a statute's meaning is clear and unambiguous, we apply the statute as written" without turning to statutory interpretation. *Gonzales* at ¶ 4. A court may only interpret a statute when the words of a statute are ambiguous. *In re Brooks*, 136 Ohio App.3d 824, 829 (10th Dist.). "Ambiguity exists when the language of a statute is susceptible to more than one interpretation." *State ex rel. Peregrine Health Servs.* at ¶ 30. "R.C. 1.49 provides that when a statute is ambiguous, a court may consider 'other matters,' such as the object sought to be attained, the legislative history, the consequence of a particular construction, and the administrative construction of the statute." *Id.*

{¶ 39} Where a case involves a challenge to the Secretary of State's interpretation of an ambiguous statute, generally courts defer to the secretary's interpretation of election law "if it is subject to two different, but equally reasonable, interpretations." *State ex rel. Colvin* at ¶ 57. However, we need not defer to the Secretary of State's interpretation where that interpretation runs counter to the plain language of the statute. *State ex rel. Stokes v. Brunner*, 120 Ohio St.3d 250, 2008-Ohio-5392, ¶ 29; *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 2008-Ohio-5097, ¶ 26. In the context of reviewing the Ohio Elections Code,

a court must also " 'avoid unduly technical interpretations that impede the public policy favoring free, competitive elections' " and construe election laws in favor of the right to vote. *Id.* at ¶ 22, quoting *State ex rel. Ruehlmann v. Luken*, 65 Ohio St.3d 1, 3 (1992).

{¶ 40} Regarding "[a]pplication for absent voter's ballot," R.C. 3509.03 states in its entirety:

(A) Except as provided in division (B) of section 3509.08 of the Revised Code, *any qualified elector desiring to vote absent voter's ballots at an election shall make written application for those ballots to the director of elections of the county in which the elector's voting residence is located.*

(B) Except as otherwise provided in division (C) of this section, *the application need not be in any particular form but shall contain all of the following:*

- (1) The elector's name;
- (2) The elector's signature;
- (3) The address at which the elector is registered to vote;
- (4) The elector's date of birth;
- (5) One of the following:
  - (a) The elector's driver's license number;
  - (b) The last four digits of the elector's social security number;
  - (c) A copy of the elector's current and valid photo identification, a copy of a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the name and address of the elector.
- (6) A statement identifying the election for which absent voter's ballots are requested;
- (7) A statement that the person requesting the ballots is a qualified elector;



(8) If the request is for primary election ballots, the elector's party affiliation;

(9) If the elector desires ballots to be mailed to the elector, the address to which those ballots shall be mailed.

(C) If the elector has a confidential voter registration record, as described in section 111.44 of the Revised Code, the elector may provide the elector's program participant identification number instead of the address at which the elector is registered to vote.

(D) *Each application for absent voter's ballots shall be delivered to the director not earlier than the first day of January of the year of the elections for which the absent voter's ballots are requested or not earlier than ninety days before the day of the election at which the ballots are to be voted, whichever is earlier, and not later than twelve noon of the third day before the day of the election at which the ballots are to be voted, or not later than six p.m. on the last Friday before the day of the election at which the ballots are to be voted if the application is delivered in person to the office of the board.*

(E) A board of elections that mails an absent voter's ballot application to an elector under this section shall not prepay the return postage for that application.

(F) Except as otherwise provided in this section and in sections 3505.24 and 3509.08 of the Revised Code, an election official shall not fill out any portion of an application for absent voter's ballots on behalf of an applicant. The secretary of state or a board of elections may preprint only an applicant's name and address on an application for absent voter's ballots before mailing that application to the applicant, except that if the applicant has a confidential voter registration record, the secretary of state or a board of elections shall not preprint the applicant's address on the application.

(Emphasis added); R.C. 3509.03.

{¶ 41} The trial court found the plain language of R.C. 3509.03 did not itself prohibit qualified electors from submitting their absentee ballot applications by email or fax. We agree. Nor does it preclude delivery by any method whatsoever: it does not address methods of delivery at all apart from the "in person" contingency in subsection (D).

{¶ 42} Pertinent to the legal issue in this case, the plain language of R.C. 3509.03 requires a qualified elector to "make written application for [absentee] ballots to the director of elections of the county in which the elector's voting residence is located" containing a signature and specified information in no particular form and "deliver[ ]" that application to the county director of elections within the months long time period. R.C. 3509.03(A) and(D). The General Assembly uses the word "delivered" in this sentence without qualification or restriction. Within this same statutory section, the General Assembly contemplates that applications may be "delivered in person." R.C. 3509.03(D). Appellants provide, and we find, no inherent aspect of the word "delivered," standing alone, that would prohibit delivery by electronic or any other means. Moreover, no express prohibition on the method of delivery occurs elsewhere in the statute.

{¶ 43} A court does not have the authority to qualify or restrict the General Assembly's wording or otherwise add a prohibition. *State ex rel. Carna*, 2012-Ohio-1484, at ¶ 18; *State ex rel. Canales-Flores v. Lucas Cty. Bd. of Elections*, 108 Ohio St.3d 129, 2005-Ohio-5642, ¶ 34-35 ("If the General Assembly had intended to restrict [certain election] statutes to persons seeking more than one office at the same election, it would have done so with appropriate language."). Having reviewed R.C. 3509.03, we find the plain language of the General Assembly does not prohibit qualified electors from making a written absentee ballot application to the county director of elections by email or fax or otherwise.

{¶ 44} However, we disagree with appellees' argument that, because R.C. 3509.03 clearly "does not prohibit" delivery of absentee ballot applications by electronic methods, appellees necessarily have a substantial likelihood of success at establishing a declaration based on a statutory "right"<sup>7</sup> to do so, as provided in the second count of the amended complaint. (Am. Compl. at 15.) R.C. 3509.03 is silent on electronic methods of delivery altogether. This silence does not address the duty of the secretary, in overseeing the fair and uniform administration of elections, to establish the particular methods of application delivery that county boards should accommodate.

{¶ 45} Here, the trial court observed that "[t]he statute does not address in what form [that is, by what means of delivery] the boards of elections are to receive absentee

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<sup>7</sup> In their brief, appellees use the phrase "allowed to" rather than "right to." (Appellee's Brief at 10.)

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ballot applications." (Decision & Entry at 9.) " 'If a statute provides an administrative agency authority to perform a specified act but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based upon a reasonable construction of the statutory scheme.' " *State ex rel. Peregrine Health*, 2020-Ohio-3426 at ¶ 32, quoting *Silver Lining Group EIC Morrow Cty. v. Ohio Dept. of Edn. Autism Scholarship Program*, 10th Dist. No. 16AP-398, 2017-Ohio-7834, ¶ 49. "[I]n the absence of evidence to the contrary, public officers, administrative officers and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully." *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 2008-Ohio-6333, ¶ 50-51, quoting *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 186 (1955).

{¶ 46} In this case, we find that the secretary acted within his authority to issue a directive supplying the methods of delivery where the statute did not, and, on this record, did so reasonably.

{¶ 47} First, the statutory scheme governing elections gives broad authorization to the secretary to issue directives and instructions to the boards "as to the proper methods of conducting elections." R.C. 3501.05(B); R.C. 3501.053; *State ex rel. Colvin*, 2008-Ohio-5041 at ¶ 11. *See also* R.C. 3501.05(C) (authorizing the secretary to issue rules and instructions for the conduct of elections). It is within the context of this broad grant of authority to issue instructions as to the proper conduct of elections that the General Assembly declined to specify permissible methods of delivery as it relates to returning absentee ballot applications to the directors of boards of elections in R.C. 3509.03.

{¶ 48} In our view, the lack of specification of appropriate delivery methods in R.C. 3509.03 when "harmonize[d]" with the broad grant of authority to the secretary in R.C. 3501.05 indicates the General Assembly's intent to permit the secretary some flexibility in fulfilling his duties under this law. *Clark v. State Teachers Retirement Sys.*, 10th Dist. No. 18AP-3426, 2018-Ohio-4680, at ¶ 18, quoting *State ex rel. Myers v. Indus. Comm.*, 105 Ohio St. 103 (1922) (" 'The different sections and parts of sections of the same legislative enactment should if possible be so interpreted as to harmonize and give effect to each and all.' "); *State ex rel. Peregrine Health*, 2020-Ohio-3426 at ¶ 33, quoting *Northwestern Ohio*

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*Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 289 (2001) ("[A] 'legislative gap' is not 'equivalent to a lack of authority for the agency to act.' \* \* \* [T]he power of an administrative agency to administer a \* \* \* program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly,' by the legislature.").

{¶ 49} Second, we cannot on this record say the secretary acted unreasonably in exercising his authority to issue a directive limiting county boards to accepting application deliveries by mail and in-person delivery. The language and liberal timeframe within the elections code, the long-standing practice of Ohio secretaries of both major parties, and the record as developed so far in this case support this method of conducting the election. R.C. 3509.03 contemplates that applicants will be given reasonable opportunity to deliver their applications to the boards. As noted above, in-person delivery is specifically contemplated under the statute, and mail delivery adds great scope to that.

{¶ 50} Unlike the UOCAVA provisions,<sup>8</sup> R.C. 3509.03 does not by textual implication mandate the secretary to permit electronic return of absentee ballot applications. The long-standing practice of Ohio secretaries of state, regardless of party affiliation, has been to implement R.C. 3509.03 in a manner that limits return of absentee ballot applications to mail and in-person delivery. (Grandjean Aff. at ¶ 30 and supporting directives going back to 2007.) Moreover, Directive 2020-13 was issued within the context of a generous, statutorily provided timetable for delivery: a qualified elector who wants to vote by absentee ballot in a November election is able to deliver his or her application to the director of the county board of elections beginning January 1st of the election year. R.C. 3509.03(D).

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<sup>8</sup> R.C. 3511.021(A), in pertinent part, states:

The secretary of state shall establish procedures that allow any person who is eligible to vote as a uniformed services voter or an overseas voter in accordance with 42 U.S.C. 1973ff-6 to apply by electronic means to the office of the secretary of state or to the board of elections of the county in which the person's voting residence is located for a uniformed services or overseas absent voter's ballot.

R.C. 3511.02 then permits UOCAVA voters to "make written application for those ballots. The person may personally deliver the application to the director or may mail it, send it by facsimile machine, send it by electronic mail, send it through internet delivery if such delivery is offered by the board of elections or the secretary of state, or otherwise send it to the director." R.C. 3511.02(A)(1).

{¶ 51} Appellees are not aided by the case they cite of *State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 135 Ohio St.3d 162, 2013-Ohio-36. Compare Appellees' Brief at 13, 14. That case, too, involved a (different) requirement that certain documents be submitted to a county board. There, "neither the board of elections nor the statute specifies how the documents are to be delivered." *Id.* at ¶ 26. The Supreme Court noted that while various courts establish rules making filing requirements explicit, "[u]nlike the courts, the [board] does not have a rule or even a policy regarding the manner in which [those] documents may be 'filed with' or 'certified' to the board. *In the absence of such a rule*, the e-mail transmission of the requisite documents [in time] was adequate." (Emphasis added.) *Id.* at ¶ 27. The Supreme Court thus implied that administrative rulemaking could have filled the statutory gap. Unlike that situation, the case at hand involves an explicit directive issued by the secretary to establish by what methods applications should be deemed "delivered." And the secretary's authority to issue directives to the county boards is provided by direct legislation. R.C. 3501.05.

{¶ 52} Importantly, too, and unlike in *State ex rel. Myles*, 2008-Ohio-5097 at ¶ 23, this record shows a vital public purpose or public interest is furthered by not allowing electors to return their applications for absentee ballots by electronic means. Appellants presented evidence, explored in more detail in the equitable factors below, demonstrating the substantial risks that permitting electronic delivery at the present time and under the present system pose to the safety and administration of the general election. This evidence was un rebutted by evidence showing the safety of electronic delivery by email or fax under stress of a higher volume or the viability of implementing such a plan within a few months of the general election.

{¶ 53} At least on the evidence presented to date, the secretary's decision to continue the long-established practice of mail and in-person return of these applications, instead of jeopardizing the security and administration of the election by implementing a new procedure to allow electronic return of the applications, cannot be deemed unreasonable.<sup>9</sup> Ohio law has accorded voters "no excuse" absentee voting since 2006, and there has been no showing that electors' ability to do so has been vitiated by the requirement that their

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<sup>9</sup> Nothing in this determination should be read as limiting the secretary from, in an exercise of his reasonable discretion, implementing R.C. 3509.03 to permit methods of delivery other than mail or in-person should the circumstances warrant it.

applications be submitted in person or by mail. In this case, the secretary had authority to issue instructions detailing how boards should take delivery of applications for absentee ballots and, in exercising that authority, issued a reasonable instruction limiting return of absentee ballot applications to mail and in-person delivery. As a result, appellants' contention that the trial court erred in finding statutory silence in this case requires boards of elections to accept absentee ballot applications electronically has merit.

{¶ 54} For these reasons, we find appellees demonstrated a substantial likelihood that they will prevail on the merits on the first count of the amended complaint (which alone does not provide basis for injunction) but did not demonstrate a substantial likelihood that they will prevail on the merits on the second count of the amended complaint.

#### **b. Claims based on the Ohio Constitution**

{¶ 55} With this action, appellees additionally seek a declaratory judgment that "refusal to accept" qualified electors' applications for absentee ballots by email or fax violates qualified electors' rights to equal protection and due process under Article I, Sections 2 and 16 of the Ohio Constitution, respectively. (Am. Compl. at 17-18.)

{¶ 56} We note that the "DECISION" portion of the trial court's ruling did not refer to appellees' constitutional arguments at all in making its determination of substantial likelihood of success on the merits. (Decision & Entry at 9-11.) Rather, the trial court reasoned from its observation that "R.C. 3509.03 does not prohibit voters from making their application for an absentee ballot by email or fax," *id.* at 10, to its determination that "[s]ince the Court finds that the plain language of R.C. 3509.03 allows for electronic mail or facsimile filing of absentee ballot applications, the Court finds the Plaintiff has met the first prong of *Vanguard*, the likelihood that plaintiff will prevail on the merits," *id.* at 11. And while the trial court then turned to a discussion of equal protection in its evaluation of the second preliminary injunction prong of individual harm absent the preliminary injunction, it still pointed to no evidence that anyone has been or will be prevented from voting by the longstanding rule. *See, e.g., id.* at 12. Regardless, because the parties argue this point and the merits have some bearing on the remaining factors, we proceed to address this issue.

{¶ 57} Although appellees advance their constitutional claims only under the Ohio and not the federal Constitution, they cite us to no substantive Ohio case law in the area

apart from their argument that they can ask for declaratory judgments on constitutional grounds. (Appellees' Brief at 22-30.) Rather, they invoke federal case law applying the " 'flexible standard' " of *Anderson-Burdick* analysis under which the " 'character and magnitude of the asserted injury' " to the voting right is weighed against " 'the precise interests put forward by the State as justification for the burden imposed by its rule,' " and the extent to which those interests require the burden. *Id.* at 27-28, citing *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir.2012), quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) and invoking *Anderson v. Celebrezze*, 460 U.S. 780 (1983). But here (unlike *Obama for Am.*, where "extensive evidence" showed actual and disproportionate preclusion from voting), they offered no evidence of the "magnitude" of the asserted injury beyond the cost of a stamp, and they have pointed to no facts of record rebutting the considerable evidence adduced by the Secretary (and in many ways confirmed by their supporting amici) relating to the state's very strong interests in preserving the integrity of the electoral system. *Obama for Am.* at 431.

{¶ 58} Specifically, this record shows that the rule allowing absentee ballot applications to be submitted in person or by mail has been in effect for the last 13 years, spanning three secretaries. Yet appellees offered no evidence of even one person over that time who was precluded from voting—or even from applying for an absentee ballot—because of the application methods specified by the secretaries. And they offered no evidence whatsoever that they will be precluded from voting in the upcoming elections either. Appellee Houlahan, for example, avers that he intends to vote by absentee ballot in this November's general election, *see* Houlahan affidavit at ¶ 6, and although he does "not want to" submit his application by mail, *id.* at ¶ 11, he does not claim that he cannot do so. He expresses a fear that first-class mail may take as long as seven to nine days to deliver, *id.* at ¶ 14. Given that he could have sent in his application by as early as January 1, 2020, R.C. 3509.03(D), and that even were he to have mailed it on the day of argument to this court and assuming the longest (nine day) delay he posits, it still would be at the board before the board even is authorized to mail out actual ballots on October 6, 2020, R.C. 3509.01(B)(2), that would be a tough argument to make. And "the requirement that voters affix a stamp to their ballot application is no more than a minimal burden" on voting and is easily outweighed by the state's interests in maintaining the integrity and efficiency of its

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election systems. *See League of Women Voters v. LaRose*, S.D. Ohio No. 2:20-cv-1638 (Apr. 3, 2020).

{¶ 59} The state interests and the related evidence in the equities will be further discussed below, but for present purposes it is enough to note that appellees have not demonstrated a substantial likelihood of success on their state constitutional claims. *Compare, e.g., Mays v. LaRose*, 951 F.3d 775 (6th Cir.2020) (even where burden on actual right to vote is "moderate," as with not allowing any opportunity to vote for people who have not yet voted or applied for ballots but who are arrested within days before an election, such claims can be outweighed by state interests arising from limited resources to administer orderly elections; denial of summary judgment to secretary reversed). After all, we, too, evaluate the claimed burden "from the perspective of only affected electors and within the landscape of all opportunities that Ohio provides to vote." *Id.* at 785 (also quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973), where petitioners could have registered to vote earlier, "but chose not to" and any lack was due to "their own failure to take timely steps to effect their enrollment").

## **2. Irreparable injury to plaintiff**

{¶ 60} "Irreparable harm' is an injury 'for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in [money] would be impossible, difficult or incomplete.' " *Aids Taskforce of Greater Cleveland v. Ohio Dept. of Health*, 8th Dist. No. 105971, 2018-Ohio-2727, ¶ 52, quoting *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 12 (8th Dist.1996); *Obama for Am.* at 436. "Irreparable harm depends upon the context in each case." *Aids Taskforce of Greater Cleveland* at ¶ 52.

{¶ 61} Within the context of elections, where a plaintiff seeking a preliminary injunction has demonstrated, by clear and convincing evidence, a threat or impairment to their constitutional right to vote, irreparable harm is presumed. *Magda v. Ohio Elections Comm.*, 10th Dist. No. 14AP-929, 2016-Ohio-5043, ¶ 38; *State ex rel. Colvin*, 2008-Ohio-5041, at ¶ 62; *Robert W. Clark, M.D., Inc. v. Mt. Carmel Health*, 124 Ohio App.3d 308, 315 (10th Dist.1997). Conversely, assertions of a threat or impairment to the constitutional right to vote that are vague and speculative do not constitute clear and convincing evidence of



irreparable harm to support a preliminary injunction. *Robert W. Clark, M.D., Inc.; League of Women Voters v. LaRose*, S.D. Ohio No. 2:20-cv-1638 (Apr. 3, 2020).

{¶ 62} Appellants argue<sup>10</sup> the trial court erred in its constitutional analysis because there is no evidence of an infringement on the fundamental right to vote and if a burden exists on qualified electors' right to vote, that burden is insignificant. The Republican committees add that the minimal costs involved with following Directive 2020-13 are not an obstacle to voting.

{¶ 63} Appellees contend the trial court correctly concluded the harm facing appellees and other voters is irreparable and not speculative since a "number of eligible voters are currently being negatively impacted under the current directive," the "negative impact and the denial of the right to submit an absentee ballot request via email or fax cannot be compensated with money damages," and that Directive 2020-13 "places an additional burden on eligible voters' access to voting" that constitutes irreparable harm, and that irreparable harm is presumed when constitutional rights are threatened or impaired. (Appellees' Brief at 31.)

{¶ 64} We agree with appellants. While constitutional protections concerning the fundamental right to vote are presumed to constitute irreparable injury, as previously explained, appellees have not demonstrated a substantial likelihood of success on their state constitutional claims. This is in no small part due to the lack of evidence of harm in this case. Appellees have not provided evidence that they will be unable to have their votes counted unless Directive 2020-13 is enjoined to allow return of applications for absentee ballots by email and fax. *Compare Obama for Am.*, 697 F.3d at 431 ("Plaintiffs introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting"). The record shows nothing that stops Houlihan, or others, from mailing in an application now (just as nothing is shown to have stopped him from doing so over the last nine months). Even under the time parameters he posits, his access to the ballot would be secured.

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<sup>10</sup> We note appellees contend the secretary entirely disregarded this factor on appeal, thereby waiving it for review and conceding appellees will be irreparably harmed. Having reviewed appellants' briefs, we disagree. The argument in pages 15 through 24 of the appellant's brief and pages 27 through 28 of the Republican committees' brief specifically address the trial court's reasoning on this factor.

{¶ 65} We have reviewed the evidence before the trial court, and any additional burden Directive 2020-13 places on eligible voters' access to voting, appears, at most, modest. (Decision & Entry at 12.) Moreover, as previously noted in relation to standing, the actual losses of time or money in delivering an absentee ballot to a board of election or buying a stamp and delivering it to a mail receptacle are minimal. *See League of Women Voters.*

{¶ 66} Therefore, we find, on this record, that any harm to appellees carries little weight in favor of the preliminary injunction.

***3. Unjustifiable harm to third parties if the injunction is granted, and the public interest***

{¶ 67} In opposing appellees' motion, appellants submitted evidence pertaining to cybersecurity and the impact of this injunction on the secretary's office, Ohio's boards of elections, and the election itself if it is granted.

{¶ 68} The Ohio Chief Information Officer for the Ohio Secretary of State testified to "numerous problems" with cybersecurity threats to Ohio's elections infrastructure, including exposing Ohio's internet-based election system infrastructure (particularly voter registration bases and associated information technology ("IT") systems) to hackers who use tactics such as cyber-attacks by "phishing," "spear-fishing," and "ransomware." (Wood Aff. at ¶ 2a, 2c, 2d, 3f, 3g, 3f.) He is well qualified to assess this threat, as he is responsible for directing the secretary's office's use of information technology and, among other duties, developing and implementing the secretary's cybersecurity program for both the secretary's office and each one of Ohio's 88 county boards of elections. *Id.* at ¶ 1f. This includes protecting the secretary's elections-related systems from foreign and domestic hackers and directing the county boards of elections how to do so. *Id.* at ¶ 1k.

{¶ 69} Wood noted that currently, "[a] range of adversaries, both foreign and domestic, have both the capability and the intent to inflict harm on our democratic process using cyber and mis- and disinformation operations tools." *Id.* at ¶ 3a. In fact, foreign hackers have penetrated the statewide voter registration system of a large U.S. state, and, recently, two Ohio counties suffered cyber-attacks that compromised their voter registration systems. *Id.* at ¶ 2d, 4b, 4c, 4d.

{¶ 70} To Wood, "[e]lectronic transmission of documents through email and/or fax present specific and known cyber security vulnerabilities." *Id.* at ¶ 6a. Email is generally not suitable for communications with sensitive information and is often used for cyber-attacks that can result in malware infecting a computer and spreading throughout the network; and faxes are generally not suited for sensitive communications and are susceptible to being leveraged to compromise other machines on the network. *Id.* at ¶ 6c, 6d. Wood notes the risk that email "recipient[s] might be misled into downloading malicious software" disguised as an attachment to a message "with the subject line 'Absentee Ballot Application.'" In [an] attack, \* \* \* the attachment would not be an absentee ballot application but instead would be a virus or some other form of malware designed to delete data or disrupt the operations of the board's computer systems." *Id.* at ¶ 3f and 3g.

{¶ 71} Wood explained that the secretary issued by directive a comprehensive strategy for both local boards of elections and the state to help ensure the election system infrastructure. *Id.* at ¶ 5b. The secretary requires boards of elections to receive cybersecurity security training annually, and IT staff frequently send alerts to employees and county boards of elections with updates about cyber-attacks. *Id.* at ¶ 5e, 5h.

{¶ 72} Still, in Wood's opinion, "[t]ransitioning to a process of transmitting thousands or tens of thousands absentee ballot application to the county boards of elections via email will substantially increase the likelihood that bad actors will slip emails with malicious attachments into the huge volume of absentee ballot request emails." *Id.* at ¶ 6e. Adequate security would be "impossible \* \* \* to implement" given the timing and likely volume of emails—it "cannot be done," and opening such emails is specifically counter to the existing instruction to employees to not open unsolicited or suspicious emails. *Id.* at ¶ 6f, 6k.

{¶ 73} Considering the security risks involved and the timing prior to the general election, in Wood's professional opinion he averred that implementing a new procedure permitting email or fax absentee ballot application delivery would significantly increase the risks of "profound" or "catastrophic" problems. *Id.* at ¶ 3c, 3d, 6g, 6h, 6k. "Because the county boards of election have not been trained to securely review thousands or tens of thousands of absentee ballot applications sent as email attachments, \* \* \* implementing a new, untried, untested, and unsecure system \* \* \* will substantially increase the likelihood

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that a bad actor could successfully conduct a cyber-attack on one or more of our county boards of elections, potentially impacting the 2020" general election in Ohio. *Id.* at ¶ 6g. "A successful cyber-attack could completely crash the county board of elections[]" computers, lock them out of their voter registration and other databases for a ransomware attack, or even delete or alter voter registration information." *Id.* at ¶ 6h. Attached to Wood's affidavit are Directives 2018-15 and 2018-18, which demonstrate the many risks associated with electronic communications that the secretary and the boards of elections are trying to mitigate with security protocols.

{¶ 74} Two directors of separate county boards of elections submitted affidavits outlining the process for receiving UOCAVA applications by email and fax. According to the Hamilton County director, the board does not have a separate, secure system to receive forms submitted by UOCAVA voters, but they have safeguards to prevent and recover from cyber-attacks. (Poland Aff. at ¶ 15.) Employees receive security training in which they are taught to not open suspicious emails. If an email is suspicious, it must be reviewed by the IT team before it can be opened. *Id.* "Based on [her] professional training and experience and given the amount of absentee applications already submitted, [she] anticipate[s] that the [b]oard would receive tens of thousands electronically submitted absentee applications if the Court were to allow voters to submit these applications electronically." *Id.* at ¶ 13. She anticipates receiving significantly more applications for absentee ballots than in the past general election years; as of August 5, 2020, the board received 15,077 applications from both UOCAVA and non-UOCAVA voters—a 4,994 percent increase from 2016. *Id.* at ¶ 14.

{¶ 75} The Hamilton County director states that the board "currently has no plan in place for reviewing electronic submission of application for absentee ballots submitted by non-UOCAVA voters." *Id.* at ¶ 13. In her professional opinion, if the court were to allow all voters to submit absentee applications electronically, the board would have to hire additional staff singularly dedicated to processing these applications, and may also have to hire IT professionals: "[a]bsent increases in staffing and resources, the Hamilton County Board of Elections would not be able to process the significant increase in electronically transmitted applications for absentee ballots." *Id.* at ¶ 18.

{¶ 76} The Delaware County director, who has administered five presidential elections, agreed. "Significant advance planning is required to ensure that the election runs

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smoothly" and presidential elections are the busiest elections administered by the board. (Herron Aff. at ¶ 6.) The Delaware County board receives far fewer UOCAVA absentee ballot requests than non-UOCAVA ballot requests; in 2016 only 370 requests were UOCAVA compared to 44,000 non-UOCAVA. *Id.* at ¶ 15. Currently, there is no plan in place for reviewing email submissions of absentee ballot applications submitted by non-UOCAVA voters, and the board does not have a dedicated computer or fax machine for such purposes. *Id.* at ¶ 17. She anticipates that if such a procedure were permitted, the board would have to hire and train additional staff for that purpose, which would negatively affect their efforts to attract and hire much-needed poll-workers. *Id.* at ¶ 18. This would potentially impact election day. *Id.*

{¶ 77} Furthermore, the board has been trained on handling security threats associated with suspicious emails by not opening suspicious emails or attachments and to then forward those suspicious emails to IT staff. *Id.* at ¶ 19. Implementing this security protocol is possible given the small number of UOCAVA email applicants. *Id.* at ¶ 20.) In her opinion, the board would not be able to maintain these security protocols if the board were required to accept non-UOCAVA applications. *Id.* at ¶ 21.

{¶ 78} The director believed such a change could invite fake applications and the security risks could compromise both the network and election day voting. *Id.* at ¶ 22, 24. In her experience, "implementing new election processes right before an election, without sufficient time for planning, training and implementation imposes significant burdens on boards and presents opportunities for errors that did not previously exist. *Id.* at ¶ 25. Overall, in her opinion, the Delaware County board would not be able to safely implement a procedure for accepting emailed absentee ballot applications in time for the November 2020 general election, and would not have the staffing resources to fulfill all of the applications and complete all of the other statutory tasks required of it to implement the November election. *Id.* at ¶ 26.

{¶ 79} Appellees did not rebut the evidence of harm to the secretary and to the boards of elections and did not dispute evidence showing the risks associated with email and fax delivery of absentee ballot applications have the potential to jeopardize the election itself. Indeed, the brief submitted on appellees' behalf by the Brennan Center, the ACLU of Ohio, and various individuals in the cyber-security field only underscores the seriousness

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of these concerns. Amici acknowledge that "Secretary LaRose is right to ask how the state can securely accept absentee ballot applications by email," and that he "is correct that the biggest security threat associated with electronic submission of applications is that the process will be used as a conduit for malware, including ransomware, to infect or access other election infrastructure systems." (Amici Brief at 18, 19.) The best way of receiving applications electronically, amici argue, would be to establish some sort of "secure online portal," not using email or fax at all. *Id.* at 18. Short of that, however, they say, "it is also possible to design a system for email submission that minimizes overall security risk." *Id.* Such a system, in their view, would require each county board to set up "a dedicated email address for the sole purpose of receiving absentee applications. The dedicated email address should be accessed from one or more isolated, dedicated computers or laptops with virus scanning software installed to help detect suspicious attachments and make it less likely that an election worker opens a malicious email attachment. These computers should also have security controls that restrict access to the broader network, with all printing from one of these computers done on a printer that is directly connected to the computer." *Id.* at 19-20. These views on how to "reduce the risk" from emailed applications, *id.* at 20, do not support an argument that the secretary should be disallowed from limiting how boards are to receive applications. Nor do they justify insouciance about how "the process currently in place" can deal with the election security concerns. *Compare* Decision and Entry at 12.

{¶ 80} Nevertheless, the trial court seemed to discount appellees' evidence and the impact of any harm they asserted. Instead, the trial court found appellants' argument about the disruption, security, administration, and integrity of the election amounted to "[a]rguing that the county boards of election may need to work harder to ensure eligible voters have access to a ballot is not harm," an argument the trial court said "cannot stand." (Decision & Entry at 11, 12.) The trial court's characterization of this argument was against the record. And the trial court was required to consider and weigh appellants' asserted harm within the framework of granting the preliminary injunction. It appears the trial court did not do so here, which is contrary to the legal standard and therefore a fundamental error in its decision. *See Vineyard Christian Fellowship of Columbus*, 2015-Ohio-5083, at ¶ 11 (stating standard for issuing preliminary judgment).

{¶ 81} Furthermore, the trial court's decision wrongly determined the evidence showed the UOCAVA procedure of accepting electronic methods of application delivery would also be a secure method for all non-UOCAVA voters to use statewide. "[T]here is no reason to believe [the current process in place for accepting absentee ballot requests by email or facsimile for UOCAVA voters] is not secure." (Decision & Entry at 12.) Appellees presented many reasons to believe that expanding the UOCAVA procedure to all non-UOCAVA voters, in this timeframe before the general election, is a security risk to the election. Appellees presented no evidence to rebut appellants' evidence on safety risks and administration problems in the timeframe here.

{¶ 82} In fact, the trial court largely seems to believe considerations of the timing of issuing an injunction in this case to be irrelevant. We disagree. The injunction imposed in this case does not preserve status quo but instead disrupts it. The Supreme Court of the United States has warned that, ordinarily, courts should not alter the election rules close to an election. *See Republican Natl. Comm. v. Democratic Natl. Comm.*, \_\_\_ U.S. \_\_\_, 140 S.Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). And this is hardly the time to fuel distrust in the integrity of the election process. The unrebutted evidence in this case clearly demonstrated how issuing an injunction close to an election increases the harm to the boards of elections and, as a result, the general public by placing the security and administration of the election at risk. In other words, the evidence showed the impact to the current procedures would be substantial rather than be "minimal." (Decision & Entry at 12.)

{¶ 83} Moreover, we disagree that the public interest weighs in favor of injunction; quite the opposite. Appellees submitted an affidavit of the Ohio ODP executive director that projects a marked increase in the number of Ohio electors who will choose to vote an absentee ballot and that notes a general familiarity with the reports of delays in mail delivery during the Ohio 2020 primary election. The three newspaper articles submitted by appellants discussing mail delay are hearsay, *State ex rel Colvin*, 2008-Ohio-5041, at ¶ 59, and regardless do not clearly and convincingly show U.S. mail issues prevent absentee ballot applications. Houlahan avers to generally not wanting to submit his application in

the mail, not wanting to submit his application in person to the board due to the risk to his health or the health of elections officials, and having heard statements from others about delays in mail (with first class mail taking up to seven to nine days for delivery). Appellees did not provide evidence demonstrating why they cannot promptly send their applications by mail or showing that submission of the application by email and fax is a viable option for this election.

{¶ 84} On this record, appellees have not demonstrated either that "no third parties will be unjustifiably harmed if the injunction is granted" or "the public interest will be served by the injunction." *Vineyard Christian Fellowship of Columbus*, 2015-Ohio-5083, at ¶ 11.

#### **4. Decision on preliminary injunction**

{¶ 85} The appellees demonstrated, by clear and convincing evidence, that they would have a substantial likelihood of success on their first count of the amended complaint if they show an entitlement to relief: The plain language of R.C. 3905.03 does not itself prohibit qualified electors from submitting their absentee ballot applications by email, fax, or other viable electronic means. However, appellees have not demonstrated a "right" to unlimited methods for delivery of their applications, or any duty of the secretary to expand his directive to include delivery methods beyond mail and in-person submission. Further, unrebutted, compelling evidence of harm to third parties and to the public interest went unheeded and that evidence established that this injunction jeopardizes the administration and security of the 2020 general election. The equitable factors in this case weigh heavily against granting a preliminary injunction, and in any event, appellees have established no substantial likelihood of success on any merits-based claim for the injunction they seek. *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir.2020) ("It may well be that the new [electronic-based] methods \* \* \* will prove workable. But they may also pose serious security concerns and other, as yet unrealized, problems. So the decision to drastically alter Ohio's election procedures must rest with the Ohio Secretary of State and other elected officials, not the courts.") On this record, we find the trial court abused its discretion in holding otherwise.



{¶ 86} Accordingly, and for those reasons, we sustain the secretary's assignment of error, sustain the Republican committees' third assignment of error to the limited extent indicated herein, and sustain the Republican committees' fourth assignment of error.

#### IV. CONCLUSION

{¶ 87} Having sustained the secretary's sole assignment of error, overruled the Republican committees' first and second assignments of error, sustained the Republican committees' third assignment of error to the limited extent indicated herein, and sustained the Republican committees' fourth assignment of error, we reverse the trial court's judgment and remand this matter for further proceedings consistent with the law and this decision.

*Judgment reversed, cause remanded.*

NELSON, J., concurs.

DORRIAN, J., concurs in judgment only.

DORRIAN, J., concurring in judgment only.

{¶ 88} I concur in judgment only. In so doing, I am persuaded in particular by: (1) the secretary's reasonable interpretation that R.C. 3509.03 neither prohibits, nor establishes a right to deliver an absentee ballot application by e-mail or fax, and (2) the secretary's evidence, unrebutted with evidence by appellees, regarding the significant cybersecurity risks that delivery of absentee ballot applications by e-mail or fax could have, at this late juncture, on voter registration databases and, consequently, on in-person early and election day voting. (*See* Majority Opinion at ¶ 67-82.)

{¶ 89} I write separately, however, to address the majority's analysis and conclusions that: (1) the secretary acted reasonably, pursuant to his authority under R.C. 3501.05, by *limiting* delivery of absentee ballot applications to in-person or mail (*see* Majority Opinion at ¶ 46, 49-50, 53), and (2) the harm to appellees is minimal or speculative (*see* Majority Opinion at ¶ 57-58 and 60-66). I respectfully disagree.

{¶ 90} I preface my analysis by acknowledging the immense task the secretary has had in administering the 2020 primary and general elections, and by noting that my conclusions are confined to the very unique circumstances of this case: the continuing state of emergency in Ohio due to COVID-19 and the uncertainty of normal postal service

operations. I also have taken into consideration that the secretary has demonstrated the feasibility of secure alternative means of delivery given appropriate time and resources.

### **A. State of emergency due to COVID-19 and effect on elections**

{¶ 91} On March 9, 2020, the Governor of Ohio declared a state of emergency to protect the well-being of Ohioans from the effects of COVID-19. Office of Governor Mike DeWine, *Executive Order 2020-01D* (Mar. 9, 2020). Executive Order 2020-01D noted that COVID-19 "is a respiratory disease that can result in serious illness or death \* \* \* and can easily spread from person to person" and that the virus causing COVID-19 "is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person coughs or sneezes." Executive Order 2020-01(D) indicated that as of March 9, 2020, the Ohio Department of Health ("Ohio Dept. of Health") confirmed that three patients in Ohio had tested positive for COVID-19, and there were no reported deaths.<sup>11</sup> Later that same week, the Director of Ohio Dept. of Health ("the Director") issued orders closing all K-12 schools in the state and limiting or prohibiting mass gatherings. Ohio Dept. of Health, *Director's Order In Re: Order the Closure of All K-12 Schools in the State of Ohio* (Mar. 14, 2020); Ohio Dept. of Health, *Director's Order In Re: Order to Limit and/or Prohibit Mass Gatherings in the State of Ohio* (Mar. 12, 2020).

{¶ 92} On March 16, 2020, the Director issued an order closing polling locations for the primary election to be held the following day "to avoid the imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of the people in the general population, including the elderly and people with weakened immune systems and chronic medical conditions." Ohio Dept. of Health, *Director's Order In Re: Closure of the Polling Locations in the State of Ohio on Tuesday March 17, 2020* (Mar. 16, 2020). The Director further concluded that "[t]o conduct an election at this time would force poll workers and voters to face an unacceptable risk of contracting COVID-19." *Id.* The same day, the secretary issued a directive suspending the

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<sup>11</sup> Subsequent data compiled by Ohio Dept. of Health indicates that as of March 9, 2020, there were 539 cases of COVID-19 in Ohio, 17 hospitalizations, and 1 death. Ohio Dept. of Health, *State of Ohio COVID-19 Dashboard*, <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards> (accessed Sept. 28, 2020). The Dashboard indicates "All data displayed is preliminary and subject to change as more information is reported to ODH."

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March 17, 2020 primary election until June 2, 2020. Secy. of State, *Directive 2020-06* (Mar. 16, 2020). The General Assembly subsequently enacted legislation voiding the secretary's directive and providing that any elector who had not previously cast a ballot in the March 17, 2020 primary election could request and cast an absentee ballot by April 28, 2020. Am.Sub.H.B. No. 197, Sec. 32(A), (C)(1)(a). This legislation became effective on March 27, 2020. Pursuant to Am.Sub.H.B. No. 197, with limited, specific exceptions, the primary election was conducted exclusively by absentee ballot.

{¶ 93} The statewide state of emergency declared by Executive Order 2020-01(D) remains in effect, as COVID-19 remains a threat to public health. Although limited reopening has been authorized under the Responsible RestartOhio Plan, Governor DeWine stated "[w]e put this plan together based on all the information we have about how dangerous COVID-19 still is right now, balanced with the fact that it's also dangerous to have people not working. COVID-19 is still out there. It's still killing people. We're asking Ohioans to be reasonable and rational." Gov. of Ohio, *Press Release: Governor DeWine Announces Details of Ohio's Responsible RestartOhio Plan* (Apr. 27, 2020), <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/covid19-update-april-27> (accessed Sept. 27, 2020). Ohio Dept. of Health data indicates that when the secretary issued his directive suspending the March 17, 2020 primary election, there had been 1,593 confirmed and probable cases of COVID-19 in Ohio, 86 hospitalizations, and 1 death. As of July 17, 2020, when the secretary issued Directive 2020-13, there had been 82,314 confirmed and probable cases of COVID-19 in Ohio, 9,300 hospitalizations, and 3,276 deaths. By the time oral argument in this expedited appeal was held on September 24, 2020, there had been 150,851 total reported confirmed and probable cases of COVID-19 in Ohio, 13,815 hospitalizations, and 4,727 deaths.<sup>12 13</sup>

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<sup>12</sup> COVID-19 case, hospitalization, and death data taken from the Ohio Dept. of Health COVID-19 Dashboard, available at <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards> (accessed September 28, 2020). The Dashboard indicates "All data displayed is preliminary and subject to change as more information is reported to ODH."

<sup>13</sup> Additionally, the Ohio Public Health Advisory System categorizes all Ohio counties as one of four levels, depending on whether certain risk indicators have been met. The levels are as follows: Level 1, indicating active exposure and spread of COVID-19; Level 2, indicating increased exposure and spread of COVID-19; Level 3, indicating very high exposure and spread of COVID-19; and Level 4, indicating severe exposure and spread of COVID-19. The guidance for Levels 2, 3, and 4 indicate "[d]ecrease in-person interactions" with others and "[h]igh-risk individuals should take care to follow precautions." Level 3 guidance further provides

{¶ 94} Appellee Houlahan is 81 years old. He is in a high-risk category for exposure to COVID-19.<sup>14</sup> Many members of appellee Ohio Democratic Party, as well as intervenor Ohio Republican Party, likely fall into a high-risk category as well.<sup>15</sup> Houlihan avers that he "do[es] not want to risk [his] health or the health of any elections officials that [he] would come into contact with by submitting [his] application for an absentee ballot to the Board in person." (Houlahan Aff. at ¶ 9.) The risk to Houlahan is not speculative. Nor is it insignificant. Furthermore, in-person delivery, one of the two methods of delivery permitted under Directive 2020-13, while in the past may have provided a reasonable opportunity to deliver absentee ballot applications, now presents a risk of exposure to and infection by COVID-19.

### **B. Uncertainty of normal postal operations and effect on elections**

{¶ 95} During the period when the 2020 primary election was being conducted exclusively by absentee ballot pursuant to Am.Sub.H.B. No. 197 (i.e., late-March 2020 through late-April 2020), the secretary became aware that delays in delivery of mail by the United States Postal Service created a risk that a voter who requested an absentee ballot might not receive that ballot in time to receive it and return their voted ballot by election day. (The Columbus Dispatch, *Mail delays during coronavirus outbreak hurting Ohio election, Secretary of State Frank LaRose says* (Apr. 23, 2020), attached as Exhibit C-1 to Houlahan Affidavit.)<sup>16</sup> The secretary expressed concern about postal delays affecting voting in a letter to Ohio's congressional delegation; in that letter, the secretary indicated that

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individuals are advised to "[l]imit activities as much as possible," and Level 4 guidance provides individuals are advised to "[s]tay at home" and "[o]nly leave home for supplies and services." As of September 23, 2020, the day before oral argument in this appeal, of Ohio's 88 counties, no counties were categorized as Level 4, nine counties were categorized as Level 3, and 47 counties were categorized as Level 2. See Ohio Dept. of Health, Ohio Public Health Advisory System (accessed Sept. 28, 2020), <https://coronavirus.ohio.gov/static/OPHASM/County-Level-Indicator-Breakdown.pdf>.

<sup>14</sup> See Ohio Dept. of Health, *Director's Stay Safe Ohio Order* at 2 (Apr. 30, 2020), accessible at <https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-Safe-Ohio-Order.pdf> ("According to CDC, those at high-risk for severe illness from COVID-19 include people who are sixty-five years or older and people of all ages with underlying medical conditions.").

<sup>15</sup> The Ohio Dept. of Health states that "Over 60% of Ohioans are considered high-risk based on CDC guidance. High-risk individuals are at an increased risk of severe illness and should take every precaution to guard against contracting COVID-19." See Ohio COVID-19 Risk Level Guidelines for the Public dated July 1, 2020 (accessed September 28, 2020).

<sup>16</sup> The majority states the newspaper articles attached to the Houlahan Affidavit are hearsay; however, here I quote from the secretary's own words as reported in the articles.

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postal delays "mean it is very possible that many Ohioans who have requested a ballot [for the primary election] may not receive it in time." *Id.*, quoting the secretary's letter to Ohio's congressional delegation. It appears those concerns ultimately proved to be well-founded; after the primary election, it was reported that more than 300 ballots that were postmarked on or before April 27, 2020 were delivered to the Butler County Board of Elections on May 12, 2020. Although the ballots would have been eligible to be counted based on the postmark dates, they could not be counted because they were received after the legal deadline for counting votes. In a letter sent to the deputy postmaster general regarding the same, the secretary wrote "[o]ur democratic republic is built upon the power of the vote and the trust citizens have that their vote will be counted. For these Ohioans, that trust was violated." (Cincinnati Enquirer, *More than 300 Butler County ballots delivered late won't count in Ohio primary* (May 12, 2020), quoting the secretary's letter to the deputy postmaster general, attached as Exhibit C-2 to Houlahan Affidavit.)

{¶ 96} Since April 2020, delays in postal delivery have continued to present concerns for the absentee ballot process in Ohio. The secretary has been advised by the general counsel for the United States Postal Service that there is a significant risk that delays in postal delivery may result in absentee ballots being requested by voters and returned promptly, but not delivered in time to be counted. *Ohio Democratic Party v. LaRose*, Franklin C.P. No. 20CV-5634 (Sept. 15, 2020).

{¶ 97} Appellee Houlahan avers he "do[es] not want to submit [his] completed absentee ballot application in the mail." (Houlahan Aff. at ¶ 11.) Houlahan asserts he has "read numerous news reports and statements from elections officials, including [Secretary LaRose], about delays in mail delivery that could result in [his] absentee ballot application not being delivered to the Board in time." (Houlahan Aff. at ¶ 13.) After addressing the articles attached to his affidavit, Houlahan states that "[b]ased on these reports and others, I am deeply concerned that if I submit an absentee ballot application in the mail that it will not be delivered to the Board in time for me to receive and return my absentee ballot." (Houlahan Aff. at ¶ 17.) Houlahan's concerns are not speculative. Nor are they insignificant. Furthermore, delivery by United States mail, the other of two methods of delivery permitted under Directive 2020-13, while in the past may have provided a reasonable opportunity to deliver absentee ballot applications, now may result in the same

concern expressed by the secretary in his letter to the congressional delegation before the primary election—i.e., the "very possib[ility] that many Ohioans who have requested a ballot may not receive it in time." (Ex. C-1 to Houlahan Affidavit, quoting the secretary's letter to Ohio's congressional delegation.)

**C. Feasibility of secure alternative means of delivery given appropriate time and resources**

{¶ 98} The record in this appeal indicates the secretary has been able to advise and assist the county boards of elections in implementing secure procedures for receiving electronically submitted absentee ballot requests. As pointed out by the majority, under R.C. 3511.02(A), UOCAVA voters may apply for an absentee ballot electronically to the secretary or the appropriate county board of elections. The statute specifically provides that "[t]he person may personally deliver the application to the director or may mail it, send it by *facsimile machine*, send it by *electronic mail*, send it *through internet delivery* if such delivery is offered by the board of elections or the secretary of state, or otherwise send it to the director." (Emphasis added.) R.C. 3511.02(A)(1). The option to request an absentee ballot by facsimile for such voters has been part of Ohio law since 1995, and the option for electronic submission has existed since 2010. 1995 Ohio H.B. No. 99; 2009 Ohio H.B. No. 48.

{¶ 99} Additionally, the secretary has been able to create and maintain a secure online system for voter registration. In 2016, Ohio law was amended to require the secretary to implement a secure online voter registration system. 2016 Ohio S.B. No. 63. Pursuant to that law, the secretary was required to establish a secure online system that permits "[a]n applicant to submit a voter registration application to the secretary of state online through the internet." R.C. 3503.20(A)(1).<sup>17</sup>

{¶ 100} Furthermore, the secretary and his predecessors have issued directives requiring county boards of elections to implement information technology security measures. Secy. of State, *Directive 2020-12* (July 14, 2020); Secy. of State, *Directive 2019-08* (June 11, 2019); Secy. of State, *Directive 2018-15* (June 21, 2018). The

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<sup>17</sup> Appellees' amici Election Cybersecurity Experts and Voting Rights Organizations argue that while secure delivery by e-mail is feasible, "the best approach would be to establish a secure online portal for submitting applications." (Footnote omitted.) (Amici Br. at 18.)

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secretary's chief information officer attested that Directive 2019-08 constituted "a comprehensive, multi-faceted security strategy for both local boards of elections and the State to help ensure a secure election system infrastructure." (Wood Affidavit at 5(b).) That same directive "requires each board of elections to receive cyber security training from the [Secretary of State] as well as training their own staff annually on cybersecurity." (Wood Affidavit at 5(e).) These technology security measures and training include how to detect and avoid "phishing" attacks through e-mail and other types of cyber-attacks. (Wood Affidavit at 5(b), (f), (h).) Moreover, as appellees note, the secretary has touted the cybersecurity measures promoted by his office as making Ohio a national leader in election security. *See* Secy. of State Press Release, *LaRose Setting New Standard for Election Security* (July 14, 2020); Secy. of State Press Release, *LaRose Issues First in the Nation Secretary of State Vulnerability Disclosure Policy* (Aug. 11, 2020). The secretary has indicated he favors some sort of electronic or online absentee ballot application process. (Wood Affidavit at 6(k).)<sup>18</sup>

{¶ 101} The secretary has demonstrated the feasibility of secure alternative means of delivery given appropriate time and resources.

#### **D. Conclusion**

{¶ 102} The public health emergency existing in 2020 makes the unique circumstances surrounding the 2020 general election substantially different than an ordinary election. *See Republican Natl. Comm. v. Democratic Natl. Comm.*, \_\_\_ U.S. \_\_\_, 140 S.Ct. 1205, 1210 (2020) (Ginsburg, J., dissenting) ("The Court's suggestion that the current situation is not 'substantially different' from 'an ordinary election' boggles the mind."). The evidence in this case indicates that because of those circumstances it is likely a substantial number of voters will seek to vote by absentee ballot.<sup>19</sup> As noted above, the unusual public health conditions in which this election is being conducted are compounded by the disruption in normal postal delivery service. If the procedures for application,

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<sup>18</sup> The secretary's Chief Information Officer, Spencer Wood, indicates "[w]e may be able to securely develop and implement a form of online absentee ballot application requests for an election after the November 2020 General Election. Secretary of State LaRose is in favor of doing so, pending necessary legislative changes." (Wood Affidavit at 6(k).)

<sup>19</sup> In fact, the secretary's evidence indicates the Hamilton County Board of Elections had a nearly 5,000% increase in absentee ballot applications compared to the same time period prior to the 2016 general election. (Poland Aff. at 14.)

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delivery, and return of absentee ballots are not adequate to meet the increased demand, voters may be faced with the dilemma of either endangering their own or others' health by voting in-person or not having their vote counted either because their application for an absentee ballot or the ballot itself was not delivered in a timely manner.

{¶ 103} As the majority notes, the Sixth Circuit Court of Appeals has suggested the burden on the right to vote in this type of case should be considered " 'within the landscape of all opportunities that Ohio provides to vote.' " Majority opinion at ¶ 59, quoting *Mays* at 785. However, courts cannot accurately evaluate all of the opportunities Ohio provides to facilitate voting, including absentee voting, without considering the unique circumstances within which those opportunities exist. Courts must consider whether such circumstances increase the magnitude of the injury or compromise the reasonableness of the opportunities or of any limitations on the same. The unique circumstances surrounding the 2020 general election that must be considered are the continuing state of emergency in Ohio due to COVID-19 and the uncertainty of normal postal service operations. Taking all this into consideration, I respectfully disagree with the majority's analysis and conclusions that (1) the secretary acted reasonably, pursuant to his authority under R.C. 3501.05, by limiting delivery of absentee ballot applications to in-person or mail, and (2) the harm to appellees is minimal and speculative.

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